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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-878

NATIONAL LEAGUE OF CITIES, *et al.*,

Appellants,

v.

HON. PETER J. BRENNAN,

Appellee.

No. 74-879

STATE OF CALIFORNIA,

Appellant,

v.

HON. PETER J. BRENNAN,

Appellee.

BRIEF OF THE PUBLIC SERVICE RESEARCH COUNCIL AS AMICUS CURIAE

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On Appeal from the District Court of the District of Columbia and the companion case of California Vs. Brennan (78-879) is an appeal by plaintiff intervenor in the State of California from the same order of the District Court below.

BRIEF OF THE PUBLIC SERVICE RESEARCH COUNCIL AS AMICUS CURIAE

This brief *amicus* in support of the Appellants is filed by the Public Service Research Council with the

consent of the parties as provided for in Rule 42(2) of the Rules of this Court.

INTEREST OF THE PUBLIC SERVICE RESEARCH COUNCIL

The Public Service Research Council is a voluntary association formed by a group of private citizens, legislators, scholars, and commentators united by a common concern with the maintenance of representative government and the tradition of constitutional federalism. The Council sees in this case and in the 1974 Amendments of the Fair Labor Standards Act, insofar as those amendments apply to State and local civil servants, a grave threat both to the integrity of representative government in the States and localities and to the constitutional federalism which has played so great a role in the history of this country and which, in the opinion of the Council, must be preserved if the personal liberties upon which this nation was founded are to survive.

While believing that the Appellants in these cases are seriously and skillfully defending their interests, the Public Service Research Council is concerned lest their natural preoccupation with the issues which interest them most immediately will cause them, and hence this Court, to overlook the deeper, broader, and more ominous issues involved in these cases. The premise of the legislation under attack here is that Congress has

power under the Commerce Clause to regulate every kind of activity known to mankind – so long as that activity somehow "affects" interstate commerce. On such a premise, the Council believes, Congress may arrogate to itself the power absolutely to annihilate the autonomy, and hence the responsibility and the integrity, of all the State and local governments. Specifically, the Council believes that if the 1974 FLSA Amendments are upheld, Congress can logically claim power to impose compulsory collective bargaining on all the States and localities, a policy which the Council considers destructive in the highest degree.

SUMMARY OF ARGUMENT

On any rational standard, the two activities, commerce and government, are categorically distinct. "Commerce," within the meaning of the United States Constitution, as well as in common understanding, involves voluntary exchanges by private persons, with the transactions determined by market forces and ruled by profit and loss. Government, on the other hand, involves rule-making and law-enforcing activities determined by political considerations and political decisions, not by market forces and balance-sheet considerations.

Since the terms and conditions of government employment, like government itself, are determined by political considerations, not by the market and by profit-and-loss considerations, the Fair Labor Standards

Act Amendments of 1974[1] must be viewed as regulations of government, not regulations of commerce, insofar as they relate to government employment. The fact that governmental activities *affect* commerce no more empowers Congress to regulate State and local government than the fact that love, marriage, and divorce likewise affect commerce would empower Congress to regulate *those* activities.

Appellee's reliance upon *Maryland v. Wirtz*[2] is misplaced. To the extent that it is not readily distinguishable, *Wirtz* is in fact ruling authority *against* the constitutionality of the FLSA Amendments of 1974.

The issue raised by the FLSA Amendments of 1974 here involved has nothing to do essentially with commerce. The great issue they raise goes to the survival of the federal system and of representative government in the States and municipalities. The Constitution establishes in the United States Government only one power and one duty in respect to the internal operation of State government, the power and the duty to guarantee to each State a republican form of government.[3] But examination of the 1974 Amendments demonstrates that, if upheld, they will weaken the responsiveness of local and State governments to their constituents – and thus betray rather than

[1] Pub. L. 93-259, 88 Stat. 55, amending 29 U.S.C. § 201 et seq.

[2] 392 U.S. 183 (1968).

[3] U.S. Const., Art. IV, Sec. 4.

perform the Federal Government's duty to guarantee to each State a republican form of government.

Posing a still more ominous threat to profound American values, the decision below, if affirmed, would go far toward establishing the constitutionality also of federal laws imposing in the public sector the compulsory collective bargaining regime now prevailing in the private sector.[4] However, when States and local governments are subjected to compulsory collective bargaining laws, it will be impossible correctly to describe them as republican forms of government.

This will be true especially when compulsory bargaining laws are complemented, as they are bound to be, by provisions for "neutral" "third party" arbitration of disputes between State and local governments and unions acting as exclusive bargaining representatives of their employees. If private arbitrators subject in no way to the electorate make ultimate, binding decisions concerning governmental budgets, both the one-man one-vote principle and representative government will have been gravely weakened.

For these reasons, the decision below should be reversed and P.L. 93-259 should be held unconstitutional insofar as it purports to regulate the employment terms and conditions of State and local government employees.

[4] IV. B., *infra*.

ARGUMENT

I.

COMMERCE AND GOVERNMENT ARE CATEGORICALLY DISTINCT ACTIVITIES.

Except for the fact that a sound decision in this case ultimately turns upon it, emphasizing the obvious distinction between commerce and government would be unnecessary. The two are sharply distinct from every relevant point of view. Their one significant common feature is that they are both conducted by human beings, and this common feature is irrelevant to the issues in the present case.

A. In Both Common Understanding and Constitutional Law, the Term "Commerce" Is Normally Associated with Voluntary Exchange, with Trading, and with Activities Integral to Trading and Exchange, such as Agriculture or Manufacturing and Their Incidents. The Unique and Essential Features of Commercial Activity Lie in Its Subordination to the Market and to the Laws of Supply and Demand and of Profit and Loss.

To spell out this point at great length would be idle pedantry. All authorities, legal and philological, agree with the common definition of commerce to be found in *Webster's Unabridged*:

> "Business intercourse; esp., the exchange or buying and selling of commodities, and particularly, the

> exchange of merchandise on a large scale between different places or communities; extended trade or traffic."

This Court has ruled that the Federal Commerce Power extends to agriculture, mining, manufacturing, and all the incidents thereto, as well as to trading and exchange.[5] However, such rulings, despite the excitement they caused at first, were no more than natural, logical extensions of the fundamental concept underlying the terms "commerce" or "exchange." Before there can be commerce or exchange, something must be produced for trading purposes. The person who produces for markets is as much engaged in commerce as the person to whom he sells or from whom he buys.

The essential features of commerce are (1) consensual activity – willing producers, buyers, and sellers whose efforts are bent toward satisfying the wishes of other producers, distributors, or consumers – and (2) determination of the terms of trade by considerations of profit and loss. The key to the distinction between commercial activity and governmental activity thus lies in part in the term "consensual" and in part in the intimately related fact that participants in commercial activity, unlike those in government, must make profits and avoid losses if they are to survive. Balanced books and consistent profits are vital features of commercial activity. They play no essential role, perhaps no role at all, in the activity called government.

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[5] Cf. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); United States v. Darby, 312 U.S. 100 (1941); Wickard v. Filburn, 317 U.S. 111 (1942).

B. Government Is Force and Rule, Not Consent; and Its Measures Are Dictated by Political Considerations, Not by Market Forces or by Considerations of Profit and Loss.

Whereas mutual consent is the ruling principle of action between traders, the ruling principle of governmental action is force, rule, command. President George Washington expressed this truth succinctly. In his Farewell Address he said that:

> "Government is not reason, it is not eloquence – it is force. Like fire it is a dangerous servant and a fearful master; never for a moment should it be left to irresponsible action."

Government differs from commerce in another essential way. Besides relying upon force in contrast to consent, government decisions do respond and should respond to political considerations rather than to market considerations. The services which governments perform can never accurately be measured by market prices when, by definition, governments stand outside the market. As a famous economist and political theorist has written,

> "The objectives of public administration cannot be measured in money terms and cannot be checked by accountancy methods. Take a nation-wide police system like the F.B.I. There is no yardstick available that could establish whether the expenses incurred by one of its regional or local branches were not excessive.
>
> . . . .
>
> "In public administration there is no market price for achievements. This makes it indispensable

> to operate public offices according to principles entirely different from those applied under the profit motive."[6]

II.

INSOFAR AS THEY PURPORT TO GOVERN TERMS AND CONDITIONS OF PUBLIC EMPLOYMENT, THE FAIR LABOR STANDARDS ACT AMENDMENTS OF 1974 ARE REGULATIONS OF STATE AND LOCAL GOVERNMENT, NOT OF COMMERCE AMONG THE SEVERAL STATES.

The 1974 Amendments of the Fair Labor Standards Act extend the Act's wage and hour regulations to virtually all the nonsupervisory employees of *all* the State and local governments of the country.[7] Section 2(a) rests this extension on the Commerce Power. The theory seems to be that the Commerce Power gives Congress constitutional authority to regulate every phase of human life and action which somehow "affects commerce," for the concluding sentence of Section 2(a) declares

> "That Congress further finds that the employment of persons in domestic service in households affects commerce."

We do not challenge here the extension of the Fair Labor Standards Act to household servants. However,

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[6] L. von Mises, *Bureaucracy* 46-47 (Yale Press, 1944). *See also* P. M. Blau, *Bureaucracy in Modern Society* esp. at 107 et seq. (Random House, 1956).

[7] P.L. 93-259, Sec. 3(d)(e).

reference to this extension is nevertheless serviceable as an illustration of the extraordinary character of the Congressional assertion of power involved in the 1974 Amendments.

The Constitution of the United States does not authorize Congress to regulate every human activity in which, by its own arbitrary fiat, Congress finds an effect upon commerce. The Constitution gives Congress power

> "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . ."[8]

No reasonable, fair-minded person can view the operation of a household as a "commercial activity." In the same way, no person acting in good faith can view the operation of government as a "commercial activity." Doubtlessly, both household and governmental activities *affect* commerce among the several states; but, to repeat, that is not the test of Congressional power under the Commerce Clause. Neither governments nor households are, in common understanding, engaged in commerce or trade or business activities of any normally recognizable variety. They are both modes of existence built around different values, they exist for different purposes, the things they do and the way they do them are structured by different considerations.

Commercial activity is designed to serve consumers, and its decisions are determined by considerations of profit and loss. Households are the physical embodiments of the family urge; and the expenditures they

[8] U.S. Const., Art. I, Sec. 8, Cl. 3.

make, while undoubtedly affecting commerce among the several states, are determined by noncommercial considerations of love, affection, and the like. Governments, similarly (in nontotalitarian countries, at any rate), are structured by and in accordance with noncommercial considerations. Obviously, to repeat, what governments do, like what families do, affects commerce. But governments are aimed at noncommercial ends, and, as pointed out above, their activities are determined essentially by political considerations, not by considerations of profit and loss.

From the economic point of view, governments, like families, are consumers – not producers of goods. Even in the so-called "proprietary" functions, governments are, on net, consumers. They normally run at deficits. The New York Subway System, for example, runs up an enormous deficit each year. So, too, probably, do most other governmental "proprietary" operations. Needless to say, police forces, fire departments, sanitation operations – these all (like the family) are nonprofit, nonbusiness operations. The violence done to language and meaning by the attempt to drag the family and government into the classification of "commerce among the several States" should be spurned by this Court.

To the extent that they apply to the wages and hours of the employees of the States and localities, the FLSA Amendments of 1974 must therefore be viewed as regulations of government, not of commerce. The monies which the States and localities expend on employment are no less governmental expenditures than those spent on courthouses, police stations, firehouses,

police cars, garbage trucks, roads, schoolhouses, etc., etc. These are all *governmental* – not commercial – expenditures. The allocations of public funds among them all are equally politically determined; they are not determined by considerations of profit and loss.[9] If this Court holds that Congress has the power to dictate to the States and localities their wage and hour policies, it must hold necessarily that Congress has power also to dictate to the States and localities as regards all other expenditures which somehow "affect commerce." How can such a holding be reconciled with the Constitution of the United States?

III.

APPELLEE'S RELIANCE UPON MARYLAND V. WIRTZ IS MISPLACED. WHERE NOT DISTINGUISHABLE FROM THE PRESENT CASE, THAT DECISION MUST EITHER BE HELD TO SUPPORT APPELLANTS' POSITION, OR BE OVERRULED.

As indicated in Point II., *supra*, P.L. 93-259 includes in its coverage State and local governmental employees who by no stretch of the imagination can be regarded as performing the kinds of functions performed by the employees of firms engaged in commerce. *Maryland v. Wirtz*, 392 U.S. 183, upon which Appellee mainly

[9]Cf. J. P. Crecine (ed.), *Financing the Metropolis* (Sage Publications, 1970); H. Wellington and R. Winter, *The Unions and the Cities* 17 et seq. (The Brookings Institution, 1971); R. Horton, *Municipal Labor Relations in New York City: Lessons of the Lindsay-Wagner Years* 117 et seq. (Praeger, 1973).

relies, upheld an application of the Federal Commerce Power to only public employees who performed functions identical to those of employees of private enterprises. The necessary implication of this carefully limited ruling is that the Commerce Power of the United States does not extend to the regulation of the employment terms and conditions of State and local employees whose activities differ from and do not compete with those of employees of private firms. However, if this Court holds that the Solicitor General's construction of *Maryland v. Wirtz* is correct, then due respect for the Constitution of the United States requires that *Maryland v. Wirtz* be overruled.

A. *Maryland v. Wirtz* Held That the Federal Commerce Power Extends Only to Economic Activities of State and Local Governments That Are (1) Validly Regulated by the Federal Government When Engaged in by Private Persons and (2) Competitive with Private Commercial Activity.

The issue in *Maryland v. Wirtz* was whether or not the 1966 amendments of the Fair Labor Standards Act were valid exercises of the Federal Commerce Power insofar as they extended the Act's coverage to State and local governmental employees in certain hospitals, institutions, and schools.[10] Attention to Mr. Justice Harlan's carefully structured and painstakingly guarded opinion for the majority in *Maryland v. Wirtz* will demonstrate that the decision preserved the distinction

[10]See 392 U.S. at 186-87.

between commercial activities, which are subject to an otherwise valid exercise of the Federal Commerce Power, and governmental activities, which are not.

The starting point of Mr. Justice Harlan's analysis was *United States v. Darby*, 312 U.S. 100. As Mr. Justice Harlan pointed out, "*Darby* involved employees who were engaged in producing goods for commerce."[11] He cited with approval the *Darby* holding that Congress may "by appropriate legislation regulate intrastate activities where they have a substantial effect on interstate commerce,"[12] but there is little need to emphasize that the "intrastate activities" thus referred to were *business* activities, not *political* activities. Neither *Darby* nor *Maryland v. Wirtz* had reference to public employees engaged in activities which neither paralleled nor competed with normal commercial activities.

Mr. Justice Harlan proceeded then to emphasize, in his discussion of *Darby*, that the Court was there "of course concerned only with the finding of a substantial effect on interstate competition . . . "[13] That obvious concern, it should be noted, was *not* with the effect on "interstate commerce" but with the effect on "interstate competition" of exempting some employees of *profit-seeking businesses* from the wage and hour provisions of the Fair Labor Standards Act. As Justice Harlan said,

> "There was obviously a 'rational basis' for the logical inference that the pay and hours of

[11]Id. at 189.

[12]Id.

[13]Id. at 187.

> *production* employees affect a company's *competitive* position.
>
> "The logical inference does not stop with production employees. When a *company* does an interstate business, its *competition* with companies elsewhere is affected by all its significant labor costs, not merely by the wages and hours of those employees who have physical contact with the goods in question . . . "[14]

There can thus be no doubt that the Court's major preoccupation in both *Darby* and *Wirtz* was with *economic* activities – whether performed by private businesses or State or local governments – which might distort the interstate *competition* which is subject to the Federal Commerce Power. If further proof of this conclusion is deemed necessary, consider the following statements from the majority opinion in *Wirtz* – all re-affirming the Court's concern with only such activities of State and local governmental employees as might be considered competitive with private interstate industry:

> " . . . [W]hile the commerce power has limits, valid general regulations of commerce do not cease to be regulations of commerce because a State is involved. If a State is engaging in economic activities that are validly regulated by the Federal Government *when engaged in by private persons*, the State too may be forced to conform its activities to federal regulation . . . "[15]
>
> . . . .
>
> "This Court has examined and will continue to examine federal statutes to determine whether

[14]Id. at 190. Emphasis supplied.

[15]Id. at 196-97. Emphasis supplied.

there is a rational basis for regarding them as regulations of commerce among the States. But it will not carve up the commerce power to protect *enterprises indistinguishable in their effect on commerce from private businesses*, simply because those enterprises happen to be run by the States for the benefit of their citizens."[16]

B. *Maryland v. Wirtz* Cannot and Should Not Be Read as Validating All Congressional Regulations of the Employment Terms and Conditions of State and Local Governments Merely Because of Their Interstate Purchases.

P.L. 93-259 rests its regulation of the wages and hours of State and local government employees on the premise that Congress has power under the Constitution to regulate all activities which affect interstate commerce. Since State and local governments make billions of dollars of purchases in interstate commerce – so the argument runs – and since of necessity such prodigious purchases must affect interstate commerce, it follows that the Federal Commerce Power extends to all the employment practices of all the State and local governments.

However, as Mr. Justice Frankfurter once remarked, "this is a bit of verbal logic from which the meaning of things have evaporated."[17] It is, moreover, a *reductio ad absurdum* of *Maryland v. Wirtz* which Mr. Justice Harlan did his best to guard against.

If the purchases in interstate commerce of the State and local governments bring validly into play against

[16]Id. at 190 Emphasis supplied.

[17]Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 191 (1941).

their employment practices the whole array of regulatory power which Congress is given by the Commerce Clause, may Congress also tell the States and localities how they must *otherwise* disburse their resources? May it tell the States and localities what the minimum and maximum prices are that they must pay for schools, police cars, roads, garbage collection, community centers, courthouses, jails, public libraries?

If the foregoing questions are answered in the affirmative, what is left of American federalism, of the idea that within the broad limits defined by Article IV, Section 4 of the Constitution of the United States, guaranteeing to every State a republican form of government, the States are self-governing political entities? This vital idea would become a frivolous myth, a mere abstraction.

An attentive reading of *Maryland v. Wirtz* will reveal that Mr. Justice Harlan did not intend any such result. Mr. Justice Douglas, dissenting, had expressed fear that the decision would be construed to permit the Federal Commerce Power to pre-empt entirely the political autonomy of the States, e.g., by forcing them "to quadruple their police forces in order to prevent commerce-crippling riots . . ."[18] Rejecting this suggestion, Mr. Justice Harlan said that it "reflects, we think, a misreading of the Act, of *Wickard v. Filburn*, *supra*, and of our decision."[19] He went on to say that

> "We uphold the enterprise concept on the explicit premise that an 'enterprise' is a set of operations whose activities *in commerce* would all be

[18]392 U.S. at 204, 205.

[19]Id. at 196-97, note 27.

> expected to be affected by the wages and hours of any group of employees . . . "[20]

Quite clearly the vast bulk of the persons employed by State and local governments – State and local police officers, firefighters, sanitation workers, bridge tenders, public school teachers and other employees, welfare workers, etc., etc. – do not fall into the "enterprise" category thus referred to by Mr. Justice Harlan. To speak of their activities as being "in commerce" would never have occurred to him, if we are to accept his opinion in *Maryland v. Wirtz* as a coherent whole.

Point III. A., *supra*, amply demonstrates what the majority had in mind in *Maryland v. Wirtz*. As shown there, the Court upheld the power of Congress to regulate the wages and hours of only a narrowly limited class of public employees: those working in governmental establishments which performed the same functions carried on by *competing* private businesses. The dominant theme of *Maryland v. Wirtz* was that Congress is constitutionally empowered to eliminate the unfair competition which State and local *enterprises* exempted from the wage and hour strictures of the Fair Labor Standards Act may wage against *private enterprises of the same kind* which are subject to those strictures.[21]

Mr. Justice Harlan could not otherwise have so confidently dismissed the fears expressed by Mr. Justice Douglas. For if the majority had meant to hold in *Maryland v. Wirtz* that the Federal Commerce Power extended to the regulation of *all* State and local governmental employment, as P.L. 93-259 virtually

[20] Id. Emphasis supplied.

[21] See text accompanying note 16, *supra*.

provides and as Appellee urges, then Mr. Justice Harlan would have had in all honesty to acknowledge the validity of Mr. Justice Douglas's doubts and fears.

This conclusion seems too clear to call for extended argument. A holding to the effect that substantial State purchases in interstate commerce subject *all* State employment to federal regulation under the Commerce Clause would similarly subject all other State disbursements and transactions to federal regulation. From the point of view of the political autonomy of the States and localities, there is no difference between employment expenditures and all others. The same inference must be drawn if one considers the class of all State disbursements from the point of view of their effects upon interstate commerce. Indeed, one may safely assume that the States and localities probably affect interstate commerce in a vastly greater degree by their purchases of materials, goods, and services than they do by their direct employment expenditures.

That being so, acceptance of Appellee's argument in this case would be tantamount to holding that the Commerce Clause, by itself, is a grant to Congress of absolute power to regulate every imaginable phase of American life. This inference follows necessarily from the fact that it is impossible to conceive of any human relationship or activity in the United States today which does not depend, directly or indirectly, upon purchases and sales which in one way or another affect interstate commerce. Consider, for example, the family, marriage, and divorce. There is no doubt that all three affect interstate commerce in a quantitatively significant degree. Does it follow from this that Congress has power under the Commerce Clause to regulate family

life, marriage, divorce, and the economic dispositions which the interested parties make with respect to them?

To repeat: Every phase and every aspect of life relates in one way or another – in any civilized society – to commerce and trade. But to hold that because this is true it follows that Congress is empowered to regulate all phases of life is a travesty of logic – and of the Constitution of the United States. It is the same as saying that because dogs breathe and human beings breathe all human beings are dogs, or all dogs are human beings.

Maryland v. Wirtz was not guilty of this logical and constitutional fallacy, and the Court should not now allow its decision there to be thus crudely distorted and misrepresented. In bringing State and local governmental employees generally within its coverage, P.L. 93-259 is a regulation of government, not a regulation of commerce. It cannot be overemphasized that no two categories of human action are more distinct than government and commerce. Confusing and confounding them, as P.L. 93-259 definitely does, poses a threat to our constitutional federalism so serious that it can scarcely be exaggerated.

C. If Appellee's Interpretation of *Maryland v. Wirtz* Is Correct, That Decision Should Be Overruled.

Appellee makes much of the refusal in *Maryland v. Wirtz* to distinguish between "state interests whether these be described as 'governmental' or 'proprietary' in

character."[22] Note is also taken of the statement by this Court in *United States v. California*, 297 U.S. 175, 183-185, to the effect that

> "The sovereign power of the states is necessarily diminished to the extent of the grants of power to the federal government in the Constitution."

Quoted out of context and pushed to the extremities of their logical implications, the foregoing statements do indeed support Appellee's contentions. As already demonstrated herein, however (II. A., B., *supra*), these statements were made in the context of cases involving, by hypothesis, state activities of a commercial character which, moreover, competed with private commercial activities; and which, finally, were "indistinguishable in their effect on commerce from private businesses."[23] The basic requirement, explicitly recognized in both *Maryland v. Wirtz* and *United States v. California*, was that the Congressional regulation in question be an "otherwise valid regulation of commerce."[24]

Appellee's position here turns the analysis upside down and begs the question. It amounts to saying that an otherwise impermissible Congressional regulation of strictly governmental activities of the States and localities somehow becomes a valid exercise of the Commerce Power because those activities – non-commercial and noncompetitive though they may be – indirectly and to some degree affect interstate commerce.

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[22] 392 U.S. at 195.

[23] Id. at 199.

[24] Id. at 196.

If, however, this Court concludes that Appellee's construction of *Maryland v. Wirtz* is proper and necessary, the only alternative available to it compatible with the Constitution of the United States is to overrule that decision. This conclusion is rigorously dictated by three overriding considerations: the explicit command of the Constitution, the federal structure and traditions which have emerged from that explicit command, and the fatal threat to that structure and those traditions demonstrably implicit in Appellee's position.

IV.

INSOFAR AS THEY PURPORT TO REGULATE THE EMPLOYMENT PRACTICES OF THE STATE AND LOCAL GOVERNMENTS, THE FAIR LABOR STANDARDS ACT AMENDMENTS OF 1974 EXCEED THE POWERS DELEGATED TO CONGRESS BY THE CONSTITUTION, ANNIHILATE CONSTITUTIONAL FEDERALISM, AND BETRAY BOTH THE DUTY OF THE UNITED STATES GOVERNMENT TO GUARANTEE TO EACH STATE A REPUBLICAN FORM OF GOVERNMENT AND THE ONE-MAN ONE-VOTE COROLLARY OF REPRESENTATIVE GOVERNMENT.

Affirmance of the decision below will disintegrate the substance of constitutional federalism, leaving only the name. This result is rigorously determined by the theory of Appellee's case and the premise upon which the 1974 FLSA Amendments are based. *All* governmental expenditures affect interstate commerce. *No* government can operate without expenditures. Therefore all governmental activity is subject to the Commerce Clause. Such, fantastic and absurd as it may seem, is the argument which Appellee is presenting to this Court, the guardian of the Constitution.

If the Court endorses Appellee's position in this case, it will in doing so also take a long step toward insuring the demise of the States and the localities as independent, self-governing communities. There is no exaggeration in this prediction. As shown in Point B., *infra*, Congress has been and is now considering legislation which would invade the self-governing powers of the States and localities even more violently than the 1974 FLSA Amendments have done – basing these new legislative proposals, too, on the same brutal distortion of the Commerce Clause.

A review of all the relevant provisions of the Constitution will demonstrate that Congress has not only exceeded its delegated powers in this case but also positively betrayed its constitutional duties.

A. Congressional Power Over the Internal Political Operations of the States Is Confined by the Constitution to Guaranteeing Them a Republican Form of Government and to Eliminating Certain Discriminatory Practices.

The 1974 Amendments of the Fair Labor Standards Act govern the employment practices of the States and of the local governments as if there were no differences between them and private industry. This insensitivity to

the plain facts of life summarized in Point I., *supra*, is exceeded by the contempt of nearly two hundred years of constitutional history which the 1974 Amendments display.

Even before the Bill of Rights was adopted, there could be no serious doubt, as *The Federalist* explained, that the Constitution established a federal system of imperishable State governments.[25] The main body of the Constitution established in the United States Government one – and only one – power (or duty) in respect of the internal political character and activity of the States. Article IV, Section 4, provided that

> "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."

Not one of the powers delegated to Congress in Article I, Section 8, can fairly be construed as justifying Congressional regulation of the States as political sovereigns, fully in control over their internal operations, subject only to the requirement that they operate on republican, representative, principles. *In re Duncan*, 139 U.S. 449, 461, expressed the general understanding when, in reference to Article IV, Section 4, it spoke of the right of the people in each State to choose their own officers for governmental administation and to pass their own laws. Congress seems prepared now to usurp

[25]See especially U.S. Const., Art. IV, Sec. 3 and Art. V. *The Federalist* No. 17 (Hamilton), Nos. 31, 32 (Hamilton), Nos. 43, 45, 46 (Madison), *et passim*.

the right of the States to govern themselves; but, as Mr. Justice Harlan declared in *Wirtz*, this Court "has ample power to prevent what the appellants purport to fear, 'the utter destruction of the State as a sovereign political entity.' "[26]

Nor may the Supremacy Clause (Art. VI) rationally be regarded as a grant of power to control the internal political operations of the States and local governments. This Clause requires only that in areas of concurrent power the States conform their laws to those of the Federal Government. *Sinnot v. Davenport*, 63 U.S. (22 How.) 227, 242.

As to the limitations on the States contained in Article I, Section 10, and in Article IV, Sections 1-2, they too do not in the slightest degree intimate power in the Federal Government to invade the internal political autonomy of the States. While they limit the power of the States in certain respects (e.g., the Contracts Clause), they concomitantly acknowledge the internal political autonomy of the States (e.g., Art. IV, Sec. 3).

There is no need to emphasize here the affirmations of the federal principle contained in the Tenth and Eleventh Amendments. However, it may be well to refer briefly to the Civil War Amendments. These Amendments did indeed grant Congress significant power over the internal political operations of the States, especially in the Second and Fifth Sections of the Fourteenth Amendment and the Second Section of the Fifteenth. Moreover, the "one-man one-vote" rule was fashioned from the First Section of the Fourteenth Amendment. *Baker v. Carr*, 369 U.S. 186, 218, 237.

[26]392 U.S. at 196.

Whatever else may be said of these Amendments, however, their main relevance in the present case lies in the relationship they bear to Article IV, Section 4, guaranteeing a republican form of government. The Civil War Amendments and the one-man one-vote rule were designed *to enhance the representative, republican, character of the State governments. They were not designed to establish in Congress a roving, unrestrained power to weaken, let alone demolish, the right of the people of the States to run their own governments.*

In arrogating to itself control over the internal operation of State and local governments, on the pretext of an exercise of the Commerce Power, Congress in the 1974 FLSA Amendments is in fact denying the States a republican form of government. Moreover, as we shall attempt next to demonstrate, if the Court countenances *this* Congressional usurpation, Congress will in all probability present the nation in short order with even more fatal threats to the survival of the States as republican, representative, forms of government.

B. If Upheld, the Fair Labor Standards Act Amendments of 1974 Would Undermine Representative Government and the One-Man One-Vote Rule as Well as Establish the Constitutional Validity of Current Congressional Proposals Which Would Further Invade the Rights of the Citizens of the Several States to Govern Themselves.

Few propositions are clearer or more widely understood than that *all* expenditures, indeed *all*

resource allocations, in the States and the localities of this country are resultants of the normal processes of what is sometimes called representative government and sometimes called popular sovereignty.[27] What is true of *all* governmental expenditures must perforce be true also of expenditures upon the wages and salaries of public servants. The Fair Labor Standards Act Amendments of 1974, in regulating the wages and hours of the vast bulk of the employees of the State and their local governments, therefore constitute a massive invasion and abridgment of the rights of the citizens of the several States and of the municipalities to govern themselves. By the same token, they betray rather than carry out the duty of the United States to "guarantee to every State in this Union a Republican Form of Government . . . " and make a mockery of the similarly oriented one-man one-vote rule.

The 1974 Amendments are freighted with an even greater menace to the federalism and the popular sovereignty which animate the United States Constitution than those already noted here. Based on the same distortion of the Commerce Clause which underlies the 1974 FLSA Amendments, bills[28] have been proposed in Congress over the last several years which would impose

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[27]See, e.g., R. Dahl, Who Governs? *Democracy and Power in an American City* (Yale Press, 1961); H. Kaufman, *Metropolitan Leadership* as quoted in N. Polsby, *Community Power and Political Theory* 127-28 (1963).

[28]E.g., H.R. 8677, 93d Cong., 1st Sess. (Introduced June 14, 1973.) For a comparison of this bill with the National Labor Relations Act, see Petro, *Sovereignty and Compulsory Public Sector Bargaining,* 10 Wake Forest L. Rev. 25, 160-62 (1974) and G.E.R.R. No. 588: AA-1-10 (1/13/75).

upon the State and local governments compulsory collective bargaining duties which in some cases go even further than the National Labor Relations Act.[29] Indeed, there are now before Congress several bills, again based on the Commerce Clause, which would force the States and municipalities, regardless of the wishes of their citizenry, to establish wages, hours, and other conditions of employment through collective bargaining, rather than through the normal American political processes of representative government.[30]

No enormous effort of the imagination is needed in order to apprehend the consequences of such laws for representative government in the States and localities. Compulsory collective bargaining would force State and local governments to share with unions the control of employment terms and conditions which has heretofore been the exclusive responsibility of the elected and appointed representatives of the citizenry of the respective governmental units. Some States have already voluntarily adopted laws of that kind.[31] In those States, whatever else one may say of such laws, at least the United States Congress has not been involved.

But if this Court decides to uphold the 1974 Amendments of the Fair Labor Standards Act as a valid exercise of the Commerce Power, that decision will

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[29]29 U.S.C. § § 151-68 (1960).

[30]E.g., S. 3294, S. 3295 (93d Cong., 2d Sess.). As to opinion on the prospects of such legislation, see G.E.R.R. No. 574: B-17 (9/30/74); G.E.R.R. No. 588: AA-1-10 (1/13/75).

[31]See U. S. Labor Management Services Administration, Bureau of Labor Statistics, Department of Labor, *Summary of State Policy Regulations for Public Sector Labor Relations* (1973).

undoubtedly be considered in Congress an anticipatory validation of the proposals now before it to extend to all the States the kind of compulsory collective bargaining laws which only a minority of the States has thus far been willing to enact.

It is not an overstatement to say that in recent times few issues have been as profoundly troublesome as those raised by the introduction of compulsory collective bargaining in government employment. The field is swarming with questions concerning the effect of collective bargaining on the Civil Service Merit System,[32] on integrity in government,[33] even on the survival of popular and governmental sovereignty themselves.[34] One common concern among the commentators is whether or not public servants should have the right to strike. Some believe they should,[35] while others believe that strikes by public servants must absolutely be prohibited,[36] if orderly government is to survive. But if the right to strike is denied public servants, then, in the opinion of some, effective collective bargaining is foreclosed – unless the organized public servants are given a strike-substitute,

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[32]Cf. U.S. Labor Management Services Administration, Department of Labor, *Collective Bargaining in Public Employment and the Merit System* (1972).

[33]Petro, *supra* note 28 at 84-90.

[34]Id. at 64-138.

[35]Cf. G.E.R.R. No. 599: G-1, H-2 (6/17/74, No. 569: B-12 (8/26/74), No. 575: F-3 (10/7/74), No. 592: A-5 (2/10/75).

[36]E.g. D. Bok and J. Dunlop, *Labor and the American Community* 334-40 (1970); Wellington & Winter, *The Limits of Collective Bargaining in Public Employment* 78 Yale L.J. 1107, 1125-26 (1969).

such as, for example, the power to compel the governmental employer to submit to arbitration.[37]

Here, however, an even greater threat to popular sovereignty emerges. Those persons chosen to arbitrate disputes between governments and their employees become, in effect, more powerful in the disposition of community resources, gain greater control of the taxing process, than the citizens and their elected representatives themselves possess. Thus, in a dispute between the City of Marquette, Wisconsin, and a union representing its policemen,[38] one of the persons selected to arbitrate the case asked:

> "... Who elected the arbitration panel of which I am a part? To whom is this panel responsible or responsive? What pressures can the citizens of the City of Marquette bring to bear on the panel? How do they express their satisfaction or dissatisfaction with the panel's decision ..."[39]

> "... With no reflection on their integrity intended, it is a simple fact that the two panel members who endorse the majority decisions are not citizens of the City of Marquette nor even of Marquette County. And yet their decision, which has very far reaching implications, and will ultimately, no doubt, result in increased taxes for the people of the City of Marquette, is final and

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[37]Cf. McAvoy, *Binding Arbitration of Contract Terms: A New Approach to the Resolution of Disputes in the Public Sector*, 72 Colum. L. Rev. 1192 (1972).

[38]Not officially reported, the dispute is described in McAvoy, *supra* note 37 at 1199, 1208.

[39]Id. at 1208, note 100.

> binding upon those people, their government and its employees."[40]

Impressed by the threat to popular sovereignty posed by compulsory arbitration of public-sector labor disputes, one New York court has recently held unconstitutional as a violation of the one-man one-vote principle a New York statute imposing arbitration in police and firefighter labor disputes.[41]

The problems posed by compulsory public-sector bargaining are multitudinous, multi-level, and profound. Conditions vary from state to state, and the States are responding to them in a wide variety of ways.[42] The kind of experimentation for which the federal system was designed is thus proceeding as it should. If the citizens of the several States are allowed to continue such experimentation, this country will have a reasonable chance of finding out whether or to what extent public-sector bargaining is compatible with orderly representative government. Results from one State to another of the adoption of different approaches, ranging from full public-sector bargaining to no public-sector bargaining at all, will provide the experience indispensable to a practical and rational resolution of the issue from State to State.

But if, encouraged by an affirmance in this Court of the decision below, Congress should intravene to impose

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[40]Id. at 1199, note 38.

[41]City of Amsterdam v. Helsby et al., G.E.R.R. No. 591: E-1 (2/3/75) (N.Y. Sup. Ct. 1974). *Compare* State *ex rel.* Fire Fighters v. City of Laramie, -- Wyo. --, 443 P.2d 295 (Wyo. 1968).

[42]Op cit. *supra* note 31.

on all the States simultaneously the same duty to bargain collectively on the terms and conditions of public employment, all the advantages inherent in the federal system will have gone for nought. Moreover, the United States Government will have betrayed and traduced the one clear duty which the Constitution imposed upon it in respect of the structure of State government: to "guarantee to every State in this Union a Republican Form of Government."

The present case thus affords this Court an opportunity to defend constitutional federalism and popular sovereignty from a series of attacks which might otherwise prove fatal to them.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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